JUL 6 1971

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-179

COTTONWOOD MALL SHOPPING CENTER, INC.,
A Utah Corporation,

Petitioner,

vs.

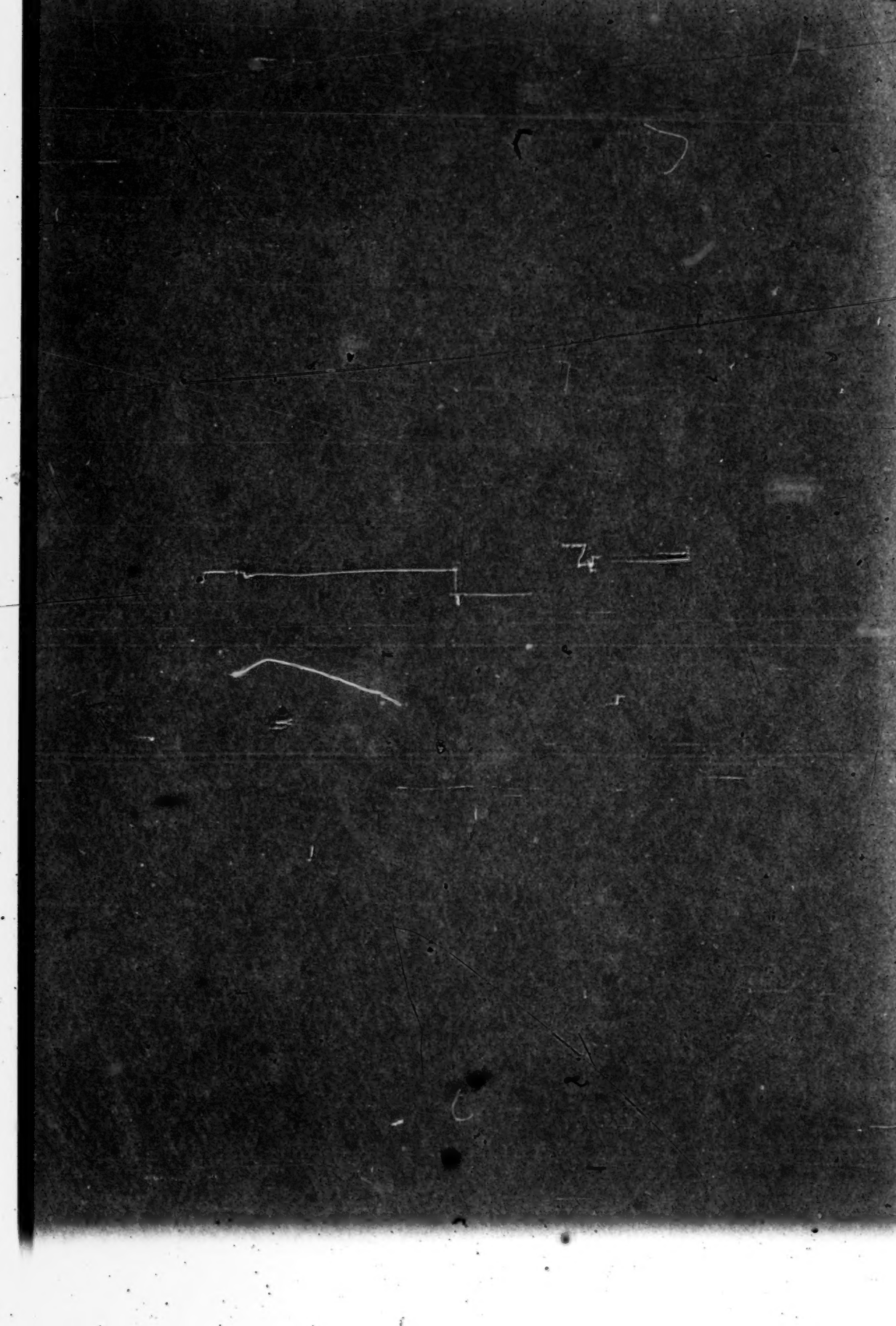
UTAH POWER AND LIGHT COMPANY,
a corporation,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIGHAM E. ROBERTS
WAYNE L. BLACK
JOHN L. BLACK
RICHARD C. DIBBLEE
ROBERT D. MOORE
Counsel for Petitioner

530 Judge Building
Salt Lake City, Utah 84111



INDEX

	Page
OPINIONS DELIVERED IN THE COURTS BELOW	1
JURISDICTION	2
STATUTORY PROVISION BELIEVED TO CONFER ON THIS COURT JURISDICTION TO REVIEW THE JUDGMENT OR DECREE IN QUESTION BY WRIT OF CERTIORARI	2
QUESTIONS PRESENTED FOR REVIEW	3
CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THIS CASE INVOLVES	4
STATEMENT OF CASE	4
POINT I. The United States Court of Appeals for the Tenth Circuit erred in deciding an important state question in a way in conflict with applicable state law in holding that petitioner's plan of operation did not come within the exceptions to the definition of "electrical corporation", in the Utah statute and in holding, therefore, it was necessary for petitioner to obtain a Certificate of Convenience and Necessity before it could generate and distribute electrical services in the Cottonwood Mall to its tenants in competition with respondent	10
POINT II. The United States Court of Appeals for the Tenth Circuit erred in deciding an important state question in a way in conflict with applicable state law in holding that the petitioner, a private corporation, was subject to public service commission jurisdiction and regulation in violation of the fourteenth amendment to the Constitution of the United States and Article I, Sections 7 and 22 of the Utah Constitution.	16
CONCLUSION	19

Page

CASES CITED

Cawker v. Meyer, 147 Wis. 320, 123 N.W. 127 (1911) 15

City of Sun Prairie v. The Public Service Commission of Wisconsin, 37 Wis. 2d 96, 154 N.W. 2d. 360 (1967) 15

Drexelbrook Associates v. Pennsylvania Public Utility Commission, 418 Pa. 420, 212 A.2d 237 (1965) 15

Frost v. Railroad Commission, 271 U.S. 583 (1926) 19

Garkane Power Company v. Public Service Commission of Utah, 98 Utah 466, 100 P.2d 571, 132 A.L.R. 490 (1940) 14

Jonas v. Swetland Co., 119 Ohio St. 12, 162 N.W. 45 (1928) 15

Medic-Call Inc. v. Public Service Commission, 24 Utah 2d. 273, 470 P.2d 258, (1970) 17

Michigan Public Utilities Commission v. Duke, 266 U.S. 570 (1925) 18, 19

Producers Transportation Company vs. Railroad Commission of California, 251 U.S. 228 (1919) 17

State ex rel Public Utilities Commission of Utah v. Nelson, 65 Utah 437, 328 Pac. 237 (1925) 16, 19

Story v. Richardson, 186 Cal. 162, 198 Pac. 1057, 18 A.L.R. 750 (1921) 15

STATUTES

United States Constitution, Fourteenth Amendment 3, 4

Utah Constitution, Article 1, Sections 7 and 22 ..... 3, 4

15 U.S.C.A., Sections 1, 2, 15 and 26 ..... 2, 4

28 U.S.C.A., Section 1254 (1) 3

Utah Code Annotated, Sec. 54-4-25(1) 4
1969 pocket supplement)

INDEX (Continued)

Page

Utah Code Annotated, Sec. 54-2-1(20) 4, 6
(1969 pocket supplement)

Utah Code Annotated, Sec. 54-2-1(30) 4
(1969 pocket supplement)

TEXT

43 Am. Jr., 571, Public Utilities & Services, Section 2 18

43 Am. Jr. 574, Public Utilities & Services, Section 5 18

Rule 19 Supreme Court Rules 20

APPENDICES

Appendix A. A-1
Findings of Fact and Conclusions of Law of United States District Court of Utah A-1
Decree of United States District Court of Utah A-5

Appendix B. B-7
Opinion of United States Court of Appeals for the Tenth Circuit B-7

Appendix C. C-21
Docket Entries of the United States Court of Appeals for the Tenth Circuit C-21
Order of the United States Court of Appeals for the Tenth Circuit C-21

Appendix D. D-22
Statutes Which this case involves. D-22

Appendix E. E-24
Constitutional provisions involved in this case E-24

IN THE

Supreme Court of the United States

October Term, 1971

No.....

COTTONWOOD MALL SHOPPING CENTER, INC.,
A Utah Corporation,

Petitioner,

vs.

UTAH POWER AND LIGHT COMPANY,
a corporation,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit filed on the 12th day of March, 1971, and which became final on the 10th day of May, 1971, upon the denial of the petition for rehearing.

OPINIONS DELIVERED IN THE COURTS BELOW

The United States District Court in and for the State of Utah, Central Division, entered a summary judgment in favor of the respondent and against the petitioner dismissing petitioner's action. Said summary judgment was evi-

denced by findings of fact and conclusions of law dated July 11, 1969 and a decree dated October 23, 1968 and entered as of July 11, 1969. Copies of these documents are appended hereto as Appendix A. No opinion was written by the district court.

The opinion and judgment of the United States Circuit Court of Appeals, Tenth Circuit was filed on March 12, 1971, and is reported in 440 F.2d 36, and a copy of said opinion is appended hereto as Appendix B. The Petition for Rehearing was denied May 10, 1971, a copy of which order is appended hereto as Appendix C.

JURISDICTION

The Petitioner seeks to have reviewed the judgment of the United States Circuit Court of Appeals, Tenth Circuit rendered on March 12, 1971. On March 24, 1971, said court granted an extension of time to April 10, 1971, for filing a petition for rehearing. On April 7, 1971, the said court entered an Order granting a further extension of time to April 25, 1971, to file a petition for rehearing. On April 22, 1971, your petitioner filed its Petition for Rehearing before said court. The United States Court of Appeals, Tenth Circuit on the 10th day of May, 1971, entered its order denying the Petition for Rehearing. This action was based upon a violation of the Anti-Trust laws of the United States, 15 U.S.C.A. Sections 1, 2, 15, and 26. A copy of these orders and entries are appended hereto as Appendix C.

STATUTORY PROVISION BELIEVED TO CONFER ON THIS COURT JURISDICTION TO REVIEW THE

JUDGMENT OR DECREE IN QUESTION BY WRIT OF CERTIORARI.

The applicable statute is Title 28 U.S.C.A., Section 1254, subdivision (1), which provides as follows:

> "Cases in the court of appeals may be received by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree ***"

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Tenth Circuit erred in deciding an important state question in a way in conflict with applicable state law in holding that petitioners plan of operation did not come within the exceptions to the definition of "electrical corporation", in the Utah statute and in holding, therefore, it was necessary for petitioner to obtain a Certificate of Convenience and Necessity before it could generate and distribute electrical services in the Cottonwood Mall to its tenants in competition with respondent.

2. Whether the Unted States Court of Appeals for the Tenth Circuit erred in deciding an important state question in a way in conflict with applicable state law in holding that the petitioner, a private corporation, was subject to public service commission jurisdiction and regulation in violation of the Fourteenth Amendment of the Constitution of the United States and Article I, Sections 7 and 22 of the Utah Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THIS CASE INVOLVES

This case involves the construction of Sections 54-4-25 (1), 54-2-1 (20), and 54-2-1 (30), Utah Code Annotated 1953, (1969 Pocket Supplement), the texts of which are appended hereto in Appendix D.

The Constitutional provisions herein involved are the Fourteenth Amendment of the Constitution of the United States and Article I, Sections 7 and 22 of the Constitution of the State of Utah, the texts of which are appended hereto in Appendix E.

STATEMENT OF CASE

This is an action under the anti-trust laws of the United States, Title 15 U.S.C.A. Sections 1, 2, 15, and 26, wherein it was alleged in the first cause of action of the second amended complaint that the petitioner was the operator and owner of a shopping center known as the Cottonwood Mall; that petitioner had substantially completed the construction of an electrical power plant to produce and distribute through private property alone, i.e., property not dedicated to a public use, electrical services, heat and air conditioning, solely for petitioner's own use and the use of its tenants who are located and do business within the confines of petitioner's shopping center. It was further alleged that the plant would cost when completed, approximately $1,500,000.00. It is further alleged that the respondent was a public utility which supplied approximately 95% of all electrical service and power distributed and sold within the State of Utah, and that the respondent had a monopoly on said business in Utah; and that it had maintained and attempted to maintain

its monopoly on said business by discouraging petitioner from operating said plant and in furtherance thereof entered into a contract with J. C. Penney Company to purchase all of its electrical service requirements from the respondent for a period of ten years and that said contract for such length of time had no honest industrial purpose but was for the purpose of eliminating competition and for closing the relevant market to petitioner. It was further alleged that the respondent carried on a campaign in contacting petitioner's tenants and falsely representing to them that petitioner's electrical service would cost more than respondent's, would not be reliable, and that petitioner's electrical power services would be interrupted and would not be available when needed; that the operation of petitioner's power plant would cause excessive vibration and noise and would adversely affect them in the conduct of their business.

All this, it was alleged, was done to eliminate petitioner as a competitor in the electrical power service business.

The second cause of action alleged that after petitioner had entered into a business relationship with J. C. Penney for the taking of electrical services, the respondent entered into a contract with J. C. Penney to furnish said services, thereby maliciously interferring with said business relationship.

The respondent made a motion to dismiss the complaint on the grounds that it failed to state a claim upon which relief could be granted. Affidavits and depositions were submitted to the Court and the Court treated the motion to dismiss as a motion for summary judgment and after argument the trial court granted the motion.

While the motion to dismiss the second amended complaint specified that petitioner did not possess a certificate of convenience and necessity, it is interesting to note that respondent did not raise this defense itself, but it was the trial court who suggested it during the course of one of the arguments prior to the filing of this motion to dismiss.

The petitioner contended that it came within the exception to the term "electrical corporation" as contained in the Utah statute Section 54-2-1 (20).

If petitioner, in its contemplated operation, comes within this exception, there would be no need for a certificate of convenience and necessity and the two causes of action set forth in the second amended complaint could properly be maintained.

The above cited Utah statute defined an "electrical corporation" as being one furnishing electrical power for public service or to its consumers or members for domestic, commercial or industrial use and then makes the following exception: "except where electricity is generated or distributed by the producer through private property alone, i.e., property not dedicated to a public use, solely for his own use, or the use of his tenants *** and not for sale to others."

The language of this statute we believe is clear and concise and the opinion by the Circuit Court has emasculated its effectiveness. Under the reasoning of the Circuit Court no person could ever come within the exception set forth in the statute.

The Circuit Court by failing to give this statute its ordinary and simple construction has decided an important

state question in a way in conflict with the plain provisions of ths statute.

The documents and depositions considered by the trial court established the following, to wit: Petitioner owns and operates a shopping center known as the Cottonwood Mall. This shopping center consists of a complex of stores and buildings surrounding a mall or promenade used by the tenants of the buildings as a common facility. There is a common roof over the stores and the mall and promenade. Petitioner owns title to all of the property on said mall as well as the parking area surrounding the Cottonwood Mall building. The stores, buildings and offices in said shopping center are leased by petitioner to tenants under written leases with the exception of the Eldredge Furniture Company building. There are approximately 70 tenants occupying the buildings, stores, and offices including merchants and professional people. The leases provide that the lessees lease a particular area of the shopping center "together with the use with other lessees of said shopping center, of the parking area and the malls within the shopping center." The leases provide that the merchant shall share in the expense of lighting the parking lot and exterior of the building, for the painting of automobile parking stalls and sweeping and cleaning the parking area including the removal of snow and ice and the maintenance of green areas of the shopping center including shrubs, trees, lawn, flowers and other plantings. The mall and parking area are owned and maintained by petitioner for the benefit of its tenants.

The Eldredge Furniture Company occupies a building and store space which is owned by petitioner. The furniture company is purchasing the building and store area from the

petitioner and it subleases a portion of said area to two merchants. In the affidavit of Sidney Horman, president of the petitioner, it appears that petitioner does not intend to furnish electrical power to the furniture company or its sublessees or to anyone else who is not a tenant of petitioner.

An association of the merchants of the Cottonwood Mall has been organized as a nonprofit corporation for the purpose of satisfying and aiding the promotion of business at the mall, and to assist in making a determination of the activities which should be conducted in the shopping center and parking area. The board of directors of this association consists of persons elected by the merchants and of Mr. Sidney M. Horman, president of petitioner corporation. All of the activities held at the mall must have the approval of the board of directors of the association and of Mr. Horman. All of the activities permitted have for their ultimate function the promotion of traffic and business at the Cottonwood Mall for the merchants who conduct their business there.

A few dances have been held at times when the stores were not open but the dances were given only with the permission of the board of directors and petitioner and were limited exclusively to the members of the organizations to which permission was given to hold the dance. These activities were allowed for the purpose of promoting good will for the Cottonwood Mall and its tenants.

Many other activities are carried on at the Mall but all of them, including the dances, have for their object the building of more traffic to and through the shopping center

and, hence, creating the opportunity for more business for the merchants at the mall.

Various promotions are conducted at the mall which, hopefully, bring more and new business to the merchants. These promotions include auto shows, traveling circus, sidewalk sales, moonlight sales, foreign car shows, garden shows, flower shows, etc. As indicated, all of these have for their purpose increasing the business of the merchants. Permission from the board of directors and from petitioner was necessary for these groups to make their displays and to put on these shows.

Security measures were taken by petitioner and the merchants association to see to it that persons without the necessary authority did not make displays or use the Cottonwood Mall or the parking area.

In reliance upon the plain meaning of the foregoing exception, the petitioner at a cost of some $1,500,000.00 constructed a building and placed therein a total energy plant consisting of five engines and five generators for the purpose of generating electricity for the use of petitioner and its tenants in the Cottonwood Mall. The building is located just south of the shopping center and the entire building and plant are located on the private property owned by petitioner. Ducts and wires have been run underground to the shopping center, all on private property owned by petitioner. Transformers have been installed in the shopping center and electrical wiring can be extended from these to the stores and offices of the tenants of petitioner. Heat recovery equipment has been installed in the plant to capture the waste heat from engines, to furnish steam to heat and

air conditioning to cool the common facilities of the mall and the buildings and spaces occupied by petitioner's tenants.

Petitioner intends to furnish electrical power only to itself and its tenants in the Cottonwood Mall Shopping Center and it does not intend to furnish electrical power to any other person than a tenant.

Petitioner intends to include the charges for electrical power, heating and air conditioning in the monthly rental rates of the tenants. The buildings, stores, malls, parking lot, plant and the land on which they stand and the land and on which the electrical wires, ducts and equipment are placed are private property owned by petitioner and have not been dedicated to a public use.

POINT I.

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ERRED IN DECIDING AN IMPORTANT STATE QUESTION IN A WAY IN CONFLICT WITH APPLICABLE STATE LAW IN HOLDING THAT PETITIONER'S PLAN OF OPERATION DID NOT COME WITHIN THE EXCEPTIONS TO THE DEFINITION OF "ELECTRICAL CORPORATION", IN THE UTAH STATUTE AND IN HOLDING, THEREFORE, IT WAS NECESSARY FOR PETITIONER TO OBTAIN A CERTIFICATE OF CONVENIENCE AND NECESSITY BEFORE IT COULD GENERATE AND DISTRIBUTE ELECTRICAL SERVICES IN THE COTTONWOOD MALL TO ITS TENANTS IN COMPETITION WITH RESPONDENT.

To paraphrase the opinion of the Circuit Court, it zeroed in on the requirement that the electricity must be

generated or distributed by the producer solely for his own use or the use of his tenants. The Circuit Court then decided there are two factors which defeat the application of the exception in the statute in this case. The first was that Eldredge Furniture Company and its sublessees and customers would have the use of this electricity and next that the people who came to the mall as customers would also have the use of this electricity and they would not be tenants and that even some people would come and not buy anything and they would have the use of this electrical distribution.

So far as Eldredge is concerned, the affidavit of Sidney M. Horman, should lay that at rest. The petitioner does not intend to furnish any person with electricity who is not a tenant and specifically mentioned Eldredge. In taking this view the Circuit Court entirely closed its eyes to the purpose and only reason for the existence of the total energy plant. It was constructed solely for the purpose of furnishing this electricity to the tenants in the Cottonwood Mall. This electricity would be used for lighting the stores, the parking lot and the common facilities. Without the tenants there would be absolutely no reason for the existence of this plant. The electricity could only be used for petitioner's own purposes and for the purposes of the tenants.

The same thing can be said of the customers who came to the mall and the persons who came to dance and to the various shows and attractions that were put on at the mall. These people took advantage of these facilities only because they were of use to the tenants in furtherance of their business.

If this reasoning of the Circuit Court is followed to its logical conclusion, there would be no way that any one could come within this exception.

First let us take the example of a single dwelling house that has in it a power plant or generator to generate electricity. If anyone other than the owner comes in the house while the lights are on, under the Circuit Court ruling, this generation of electricity would not be for the sole use of the owner. It would make no difference whether this person was an invitee or a trespasser. His use of the light produced by the electricity would eliminate the right of the owner of this dwelling house to have his own power plant.

Next let us take the example of the apartment house, of which there is at least one in Utah. The apartment house has installed a power plant to light the halls, the apartments, the outside, and the parking lot. It would just be impossible to confine the use of this electricity to the tenants in the sense used by the Circuit Court. The only purpose of this power plant is for the convenience of the tenants and any friends or relatives or business acquaintances who might come to the apartment. The very fact that they do come, would eliminate the right of this apartment house to operate its own electrical generating plant without a certificate of convenience and necessity and the regulation thereof by the Public Service Commission of the State of Utah.

The Circuit Court said that someone might come to the mall who did not buy and cited this as an example of the use of the electricity by others than the tenants or the customers. In the apartment situation, if someone came to the apartment because of making a mistake as to the address

and used the light to see the number of the apartment, it would eliminate the right of the apartment house owner to generate his own electricity without regulation.

These simple examples emphasize the absurdity of the holding and reasoning of the Circuit Court's opinion in this case.

As we have already pointed out, this opinion has emasculated the Utah statute in so far as it makes an exception to the generation and distribution of electricity through private property alone, solely for the use of the producer or for the use of his tenants.

We have only addressed ourselves to the one element set forth in the exception and relied upon by the Circuit Court as the basis of its decision.

The three elements necessary to qualify under the exception in the above cited statute are as follows:

(1) That the electricity be generated and distributed through private property alone, i.e., property not dedicated to public use.

(2) The generation and distribution by the producer must be solely for his own use or the use of his tenants.

(3) That the electricity must not be for sale to others.

Obviously, from the statement of facts, this property is private property upon which this electricity is generated and distributed and it has not been dedicated to public use. This property is the same as the property of any store where members of the public are invited to come and do business

and certainly no one would say that a store is not private property. A combination of stores does not make this mall other than private property. The merchants association and petitioner have a security force, which attempts to keep unauthorized persons out of the mall. It is private property in the true sense of the word and not dedicated to public use.

On the third element, the affidavits state that the only sale of electric energy will be to tenants and no one else.

We submit that the Circuit Court started off on the wrong foot in considering the attitude of the Utah courts and the Utah law toward public regulation. The Circuit Court did not consider that in the case of *Garkane Power Company v. Public Service Commission of Utah,* 98 Utah 466, 100 P.2d 571, 132 A.L.R. 490 (1940) the court ruled against public regulation. The court held in that case that an association that solicited membership from the public was not subject to regulations so long as it only sold electricity to members of the association so solicited. This certainly does not look as though the Utah law looks kindly on public regulation.

The corner stone of the Circuit Court's opinion is its assertion that though encouragement of competition is usually a desirable goal, the situation is otherwise in the public utility field. The extent to which the Circuit Court has pursued this untenable line of reasoning in order to sustain its position is best exemplified by the following statement from its opinion:

> "This means that in construing these statutes — which of course expressly cover the physical operational activities of Cottonwood — we must give a liberal reading to provisions subjecting the activity to regulation while simultaneously giving a more narrow scope to the exception."

We think that the shallow consideration of this case by the Circuit Court is exposed by its flippant language that it had no Utah lamp posts to light its "Erie" way. We think this shows a lack of consideration of the merits of this case.

Other cases have held in similar fact situations, but with different statutes, the operation of large complexes, such as petitioner's, are not subject to public regulation. See *City of Sun Prairie v. The Public Service Commission of Wisconsin,* 37 Wis. 2d 96, 154 N.W. 2d 360 (1967), *Cawker v. Meyer* 147 Wis. 320, 123 N.W. 127 (1911), *Drexelbrook Associates v. Pennsylvania Public Utility Commission,* 418 Pa. 430, 212 A. 2d 237, (1965), *Story v. Richardson,* 186 Cal. 162, 198 Pac. 1057, 18 A.L.R. 750 (1921), *Jonas V. Swetland Co.,* 119 Ohio St. 12, 162 N.E. (1928)

We submit that the Circuit Court has decided an important question involving substantive state law in a manner which directly conflicts with the express language of a state statute wherein it failed and refused to recognize the stubborn fact that petitioner's operation, being clearly a private operation for his own use and that of his tenants, placed him within the statutory exception to the definition of "Electrical corporation" and thus rendered him *not* subject to the state regulatory requirement of obtaining a certificate of convenience and necessity.

POINT II.

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ERRED IN DECIDING AN IMPORTANT STATE QUESTION IN A WAY IN CONFLICT WITH APPLICABLE STATE LAW IN HOLDING THAT THE PETITIONER, A PRIVATE CORPORATION, WAS SUBJECT TO PUBLIC SERVICE COMMISSION JURISDICTION AND REGULATION IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTIONS 7 AND 22 OF THE UTAH CONSTITUTION.

The petitioner is a private corporation. It owns a complex of stores and facilities for a shopping center and proposes to furnish electricity to a selected few individuals and corporations. These would all be tenants.

The Circuit Court, contrary to the holding in two Utah cases, held that this corporation would be subject to public regulation. The holding violates the Fourteenth Amendment to the United States Constitution and Article I, Section 7 of the Constitution of the State of Utah.

In *State ex rel Public Utilities Commission of Utah v. Nelson,* 65 Utah 437, 238 Pac. 237 (1925), the Utah Supreme Court held that a private corporation could not be subjected to public regulation by mere legislative fiat or edict. The language used in that case is very clear and concise. That court stated:

> "No one may successfully contend that it is competent for the Legislature to regulate and control in such respect a mere private business or to declare a

> private business to be public service or a public utility. In other words, the state may not, by mere legislative fiat or edict or by regulating orders of a commission, convert mere private contracts or a mere private business into a public utility or make its owner a common carrier. [Citations omitted.] So, if the business or concern is not public service, where the public has not a legal right to the use of it, where the business or operation is not open to an indefinite public, it is not subject to the jurisdiction or regulation of the commission . . ."

This language and holding was reaffirmed in *Medic-Call Inc. v. Public Service Commission,* 24 Utah 2d. 273, 470 P.2d 258, (1970). In that case the Court quoted the foregoing language from the Nelson case and reaffirmed the principle that private corporations are not subject to public regulation.

The Circuit Court relegated the two Utah cases to a foot note and gave no force or effect to these important rulings of the Utah Supreme Court.

This last case was decided during the time that this case was pending on appeal and was called to the attention of the Circuit Court by petitioner.

In the case of *Producers Transportation Company vs. Railroad Commission of California,* 251 U.S. 228 (1919), this court stated:

> "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, the state could not, by mere legislative fiat or by any regulating order of a commission, con-

> vert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment . . ."

The general text statements agree with the foregoing cases. In 43 Am. Jr., 571, Public Utilities and Services, Section 2, it is stated:

> "As its name indicates, the term 'public utility' implies a public use and service to the public; and indeed, the principal determinative characteristic of a public utility is that of service to, or readiness to serve, an indefinite public (or portion of the public as such) which has a legal right to demand and receive its services or commodities. The term precludes the idea of service which is private in its nature and is not to be obtained by the public,"

A state does not have the power to call a private business a public utility. The rule is stated in 43 Am. Jr., 574, Public Utilities and Services, Section 5, as follows:

> "The legislature cannot, by its mere declaration, make something a public utility which is not in fact such; and a private business, operated under private contracts with selected customers and not devoted to a public use cannot, by legislative fiat or by order of a public service commission, be declared a public utility, since that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment to the Federal Constitution."

This statement of the rule is upheld in the following cases from the Supreme Court of the United States: ***Michigan Public Utilities Commission v. Duke,*** 266 U.S. 570

(1925); *Frost v. Railroad Commission,* 271 U.S. 583 (1926). In this latter case the court stated:

> "That consistently with the due process clause of the Fourteenth Amendment, a private carrier cannot be converted against his will into a common carrier by mere legislative command, is a rule not open to doubt and is not brought into question here".

The Supreme Court not only cited the *Duke* case but also the case of *State v. Nelson,* heretofore cited from the State of Utah.

We submit that the Circuit Court has decided an important state question in a way in conflict with the applicable state law.

CONCLUSION

In this case, the Utah statute clearly provides for an exception to public regulation in the event a landlord desires to generate and distribute electricity to his tenants. The Circuit Court refused to follow this language in this case and emasculated the exception.

The Circuit Court also refused to follow two very definite holdings by the Supreme Court of Utah that a private corporation cannot be subjected to public regulation by legislative fiat.

We submit that the questions raised in this petition come within the guidelines of Rule 19 of the Supreme Court Rules wherein it is stated:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will

be granted only where there are special and important reasons thereof. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

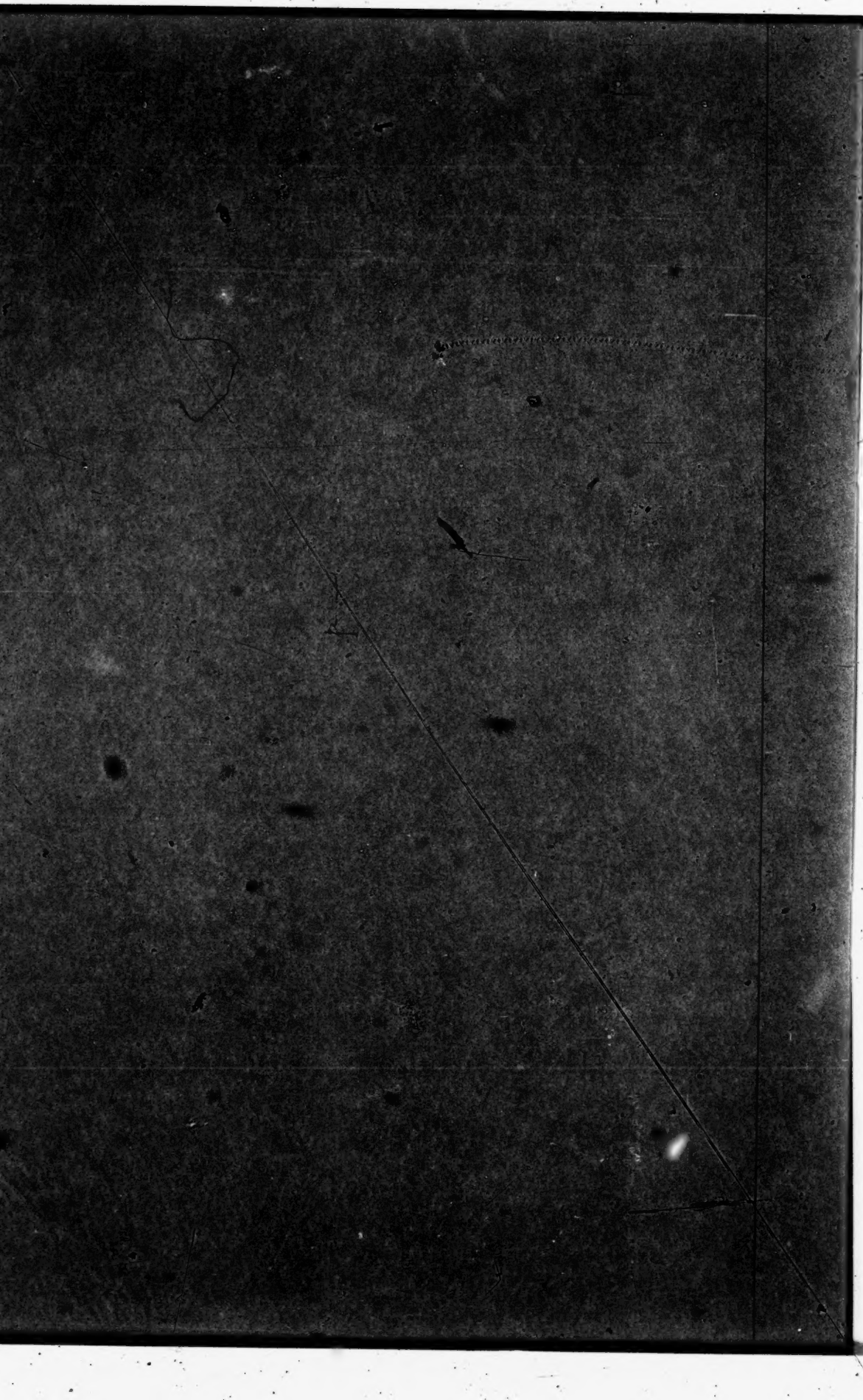
* * * *

(b) Where a court of appeals * * * has decided an important state or territorial question in a way in conflict with applicable state or territorial law ***"

For the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

BRIGHAM E. ROBERTS
WAYNE L. BLACK
JOHN L. BLACK
RICHARD C. DIBBLEE
ROBERT D. MOORE
Counsel for Petitioner



APPENDIX A.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF UNITED STATES DISTRICT COURT OF UTAH

Defendant's motion to dismiss came on for hearing the 8th day of May, 1969, before the Honorable Willis W. Ritter, Chief Judge. Plaintiff and third party defendants were represented by Brigham E. Roberts of the firm of Rawlings, Roberts & Black; the defendant was represented by Marvin J. Bertoch and Thomas A. Quinn of the firm of Ray, Quinney & Nebeker and by Sidney G. Baucom and Robert Gordon of the firm of Baucom, Gordon & Porter.

Depositions, affidavits and memoranda of law were presented and not excluded, and arguments were made by counsel. Having examined the depositions, affidavits and memoranda of law and listened to the arguments of counsel, the Court hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The plaintiff owns a shopping center in Salt Lake County, State of Utah, with the exception of an area located within the center which is owned by Eldredge Furniture Company. The plaintiff constructed the buildings located in the shopping center and leases them to approximately seventy different tenants, and has sold one of the properties to the Eldredge Furniture Company.

2. Since 1961, defendant has supplied electrical power to the tenants and owners occupying the Cottonwood Mall Shopping Center.

3. Plaintiff in 1968 and 1969 installed a power plant on the premises, and by this lawsuit seeks to compete with the defendant in supplying electrical power for use in the shopping center.

4. Defendant, having expended approximately $558,000.00 in capital investment to supply the center with electricity, is equipped and able and desires to continue to provide all of the electrical power needed for present and future use in the shopping center.

5. The sole issue submitted to this Court by defendant's motion to dismiss, which the Court under Rule 12(b), Federal Rules of Civil Procedure, will treat as a motion for summary judgment, is whether or not the plaintiff has the right under Title 54, Utah Code Annotated, to compete with the defendant in the furnishing of electrical power in the Cottonwood Mall Shopping Center.

6. The Cottonwood Mall Shopping Center consists of approximately seventy stores and offices, which sell merchandise of various types and supply professional services to thousands of members of the general public. The stores include such large department stores as Z.C.M.I. and J. C. Penney Company, plus grocery stores, clothing stores, drug stores, restaurants and various other types of stores commonly found in a large shopping center. The premises include a large electrically lighted parking lot. In addition, numerous persons other than shoppers are attributed to and

use the facilities of the center for such activities as automobile shows, Junior Achievement fairs, garden and flower shows, boat shows, Go-Kart shows, stamp shows, Indian dancers, art and ceramic shows, bazaars, Halloween parades and other similar activities classified by the manager of the Cottonwood Mall Merchants Association as "traffic build ing events". Other activities are routinely allowed on the premises such as high school seminary dances, dances sponsored by the Latter-day Saints Church stakes, square dances, firemen's balls and Easter sunrise services, all of which are carried on when the stores are not open and are not considered by the manager of the Cottonwood Mall Merchants Association as "traffic building events".

7. If plaintiff were permitted to furnish electric power as it proposes to do, it would not be providing electric power "solely for its own use, or the use of its tenants" in contemplation of 54-2-1 (20), Utah Code Annotated, 1953.

Based on the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. 54-2-1(20), 54-2-1(29) and 54-4-25(1), Utah Code Annotated, 1953, are the controlling statutes. They read as follows: [The Court then quoted the statutes which are set forth in Appendix D].

2. The plaintiff, if permitted to generate and distribute electric power as it proposes to do, would be an "electric corporation" in contemplation of 54-2-1(20), Utah Code Annotated, 1953, and would be a "public utility" in contemplation of 54-2-1(29), Utah Code Annotated, 1953, and

could not legally construct an electrical plant or system or generate or distribute electricity without first acquiring a certificate of public convenience and necessity as required by 54-4-25(1), Utah Code Annotated, 1953.

3. Plaintiff has not been granted a certificate of public convenience and necessity and is not entitled under the law to be granted such a certificate for the generation or distribution of electricity to serve the Cottonwood Mall Shopping Center.

4. It was not the intention of the Utah Legislature in adopting 54-2-1(20), Utah Code Annotated, 1953, to allow persons to avoid the supervision and regulation of the Public Service Commission in connection with supplying electrical service to large shopping centers. It is a purpose of Utah law involving public utilities to protect users of electricity with respect to rates and quality of service. The legislature and the law intend that such protection be supplied to such users as those occupying the Cottonwood Mall Shopping Center.

5. The defendant is authorized by law to serve the users of electricity in the Cottonwood Mall Shopping Center and is entitled under the law to provide the exclusive electrical service to all users of electricity in the Cottonwood Mall Shopping Center, and accordingly is not in violation of any antitrust law and not illegally interfering with or violating any of plaintiff's rights in so doing.

6. Defendant is entitled to summary judgment against the plaintiff dismissing the plaintiff's complaint and for its costs incurred herein.

Dated this 11th day of July, 1969.

DECREE OF THE UNITED STATES DISTRICT COURT OF UTAH

Defendant's motion to dismiss came on for hearing on the 8th day of May, 1969, before the Honorable Willis W. Ritter, Chief Judge. Plaintiff and Third party defendants were represented by Brigham E. Roberts of the firm of Rawlings, Roberts & Black; the defendant was represented by Marvin J. Bertoch and Thomas A. Quinn of the firm of Ray, Quinney & Nebeker, and by Sidney G. Baucom and Robert Gordon.

Depositions, affidavits and memoranda of law were presented and not excluded, and arguments were made by counsel. Depositions and affidavits having been received, defendant's motion, in accordance with the provisions of Rule 12(b), Federal Rules of Civil Procedure, will be treated as a motion for summary judgment and disposed of under the provisions of Rule 56, Federal Rules of Civil Procedure.

The Court, having examined the depositions, affidavits and memoranda of law, and having listened to the arguments of counsel, and good cause appearing therefor,

And the Court expressly determines that there is no just reason for delay, and the Court expressly directs that this Decree be entered as a final decree pursuant to the terms and provisions of Rule 54(b), Federal Rules of Civil Procedure,

IT IS HEREBY ORDERED that defendant, Utah Power & Light Company, be, and is hereby granted sum-

mary judgment against plaintiff, the complaint of the plaintiff is hereby dismissed with prejudice and on its merits, costs to be paid by the plaintiff.

It appearing to the Court that through an oversight of the parties the Court did not make the determination of no just reason for delay and the direction that the decree be entered as a final decree and the parties and the Court intending that the decree should have such effect, IT IS FURTHER ORDERED that this Decree be entered as of the 11th day of July, 1969.

DATED this 23rd day of October, 1969.

APPENDIX B.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

March Term, 1971

COTTONWOOD MALL SHOPPING CENTER, INC., a Utah corporation, *Plaintiff and Appellants,* vs. UTAH POWER & LIGHT COMPANY, a Maine Corporation *Defendant and Appellee, et al.,*	Appeal from the United States District Court for the District of Utah No. 474-69

Before LEWIS, Chief Judge, BROWN, Chief Judge*, and SETH, Circuit Judge.

BROWN, Circuit Judge.

Through the wide door of a federal antitrust suit we back into an earth-bound, Utah-bound *Erie* problem of statutory construction since the thrusters on the alternative due process claim cannot orbit it to a constitutional apogee. In more austere terms the question is whether a shopping center operator in supplying electricity to the lessee merchants

* Of the Fifth Circuit, Sitting by Designation

becomes subject to regulation as a public utility. The Court below answered in the affirmative, and we affirm.

Cottonwood,[1] owner and operator of a large shopping center in the trade area of Salt Lake City sued Power Company[2] alleging that Power Company had attempted to monopolize the market for electrical power at the center and had interfered with existing contracts of Cottonwood to provide electricity for J. C. Penney, a tenant on the Mall. The basic question is put in issue by the defense that Cottonwood lacks the necessary Certificate of Public Convenience from the Utah Public Service Commission and therefore cannot challenge these economic activities of Power Company.[3] The Court below gave summary judgment to Power Company on the ground that Cottonwood would need a Certificate before it could press its claims, for if it had no right to sell electricity, then by definition Power Company could not interfere with this "right."

This brings into play the Utah statutory structure of utility regulation which starts with the traditional requirement of a Certificate of Public Convenience[4] for a broad

---

[1]Cottonwood Mall Shopping Center, Inc., a Utah corporation.

[2]Utah Power and Light Company, a Maine corporation, having franchises and requisite certificates to furnish electricity to the public.

[3]As an adjunct to this defense, Power Company sought and obtained a preliminary injunction to prevent Cottonwood from interfering with Power Company's business relationships with its customers on the Mall, one of whom was J. C. Penney Company.

[4]Utah Code Annotated § 54-4-25(1) (1969 Supp.) provides that:

> "No railroad corporation, street railroad corporation, aerial bucket tramway corporation, gas corporation, *electric corporation,* telephone corporation, telegraph corporation, heat corporation, automobile corporation, aircraft carrier (corporation), water corporation or sewage corporation shall henceforth establish, or begin construction or operation of a railroad, street railroad, aerial bucket tramway, line, route, plant or system or of any extension of such railroad, street railroad, aerial bucket tramway, line, route, plant or system, without having first obtained from the commission a certificate that present or future *public convenience and necessity does or will require such construction* * * *"
> (Emphasis added).

range of business including an "electrical corporation" which is broadly defined[5] as is "public utility"[6] generally. The decision turns on the exception whether Cottonwood distributes the electricity "(i) through private property alone, i.e., property not dedicated to public use, [ii] solely for his own use, or the use of his tenants * * *." And we zero in on factor [ii].

---

[5]In Utah Code Annotated § 54-2-1(20) (1969 Supp.) "electrical corporation" is defined:

> "Every corporation, *cooperative association* and person, their lessees, trustees and receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any electrical plant, or in anywise furnishing electric power, for public service *or to its consumers or members for domestic, commercial or industrial* use, within this state except where electricity is generated on or distributed by the producer through private property alone, *i.e., property not dedicated to public use,* solely for his own use, or the use of his tenants, *or by an association of unit owners formed under the "condominium ownership act," chapter 111, laws of Utah, 1963* [*57-8-1 to 57-8-35*] *and not for sale to others."*

The annotations to § 54-2-1 indicate the 1965 changes in this and other sections from their prior reading which we have indicated above by underscoring.

> History: L. 1917, ch. 47, art. 2, §1; C.L. 1917, § 4782; L. 1925, ch. 12, §1; R. S. 1933 & C. 1943, 76-2-1; L. 1948 (1st S. S.), ch. 7, §1; 1957, ch. 106, §1; 1959, ch. 94, §1; 1965, ch. 106, §1; 1969, ch. 153, §1.

Compiler's Notes.

The 1965 amendment inserted "co-operative association" after "corporation," "or to its consumers or members for domestic, commercial or industrial use" after "public service," "i.e., property not dedicated to public use" after "property alone" and "or by an association of unit owners formed under the 'condominium ownership act,' chapter 111, Laws of Utah, 1963" after "of his tenants" in subd. (20) and substituted "electrical corporation" for "electric corporation" after "gas corporation," inserted "or electrical corporation" after "gas corporation" and "or electricity" after "gas," and substituted "member" for "consumer" after "furnished to any" in the first and second sentences of the first paragraph and added the proviso at the end of the second paragraph of subd. (29), and made minor changes in punctuation.

[6]Section 54-2-1(29) provides:

"The term 'public utility' includes every * * * gas corporation, *electrical corporation* * * * where the service is performed for, or the commodity delivered to, the public generally, or in the case of a gas corporation or *electrical corporation* where the gas *or electricity* is sold or furnished to any *member* or consumers within the state of Utah for domestic, commercial or industrial use. And whenever any * * * gas corporation, *electrical corporation* * * * performs a service for or delivers a commodity to the public, or in the case of a gas corporation *or electrical corporation* selling or furnishing gas *or electricity* to any member or consumers within the state of

Cottonwood Mall is a large shopping center in the Salt Lake City trade area. The Center lies under one roof and contains a complex of stores and buildings surrounding a Mall. Cottonwood owns all of the property on the Mall as well as the parking area around the building except for the Eldridge Furniture building that Eldredge is buying from Cottonwood under a Utah Uniform Sales Agreement.[7] Except for the Eldredge building, all of the space in the Center is presently leased to about seventy tenants under written leases. The tenants share the expenses of lighting the parking lot and the exterior of the buildings, for painting the automobile parking stalls, for sweeping and cleaning the parking area, and for maintaining the green areas in the Center.

Utah, for domestic, commercial or industrial use, for which any compensation or payment whatsoever is received, such * * * gas corporation, *electrical corporation* * * * is hereby declared to be a public utility, subject to the jurisdiction and regulation of the commission and to the provisions of this title."

The underscoring indicates the changes in this statute from the original. See Note 5, *supra.* The Compiler's Notes state this as to gas:

> "The 1959 amendment inserted provisions concerning selling or furnishing gas to consumers for domestic, commercial, or industrial use in subds. (18) and (29)."

---

[7]Eldridge subleases part of its building to Morgan Jewelry Company and to Ex-Cel-Cis Beauty Salon.

The merchants of Cottonwood Mall have organized a non-profit corporation whose purpose it is to promote business on the Mall and to determine the extra-commercial promotional activities that should be conducted there. These activities will, in the jargon of the shopping center world, generate traffic to the Center with the hope, if not expectation, that many will then or later become customers of some or all of the merchants. The Board, consisting of persons elected by the merchants (who pay substantial dues based on square footage) and of the President of Cottonwood must approve any such outside activities on the Mall. In the past the Board has authorized a whole gamut of activities including automobile shows, small car races, sidewalk sales, garden shows, boat shows, stamp shows, Indian dances, a circus, art displays, and handicraft shows.[8] Also, the auditorium at the Center has been used by many religious, civic, social and political groups to hold gatherings, dances, and the like, a large number of which took place after store closing hours.

---

[8]Cottonwood's brief gives a more complete list:

"These promotions include auto shows; a small one ring traveling circus with one truckload of animals; a Gymkahana, consisting of small car races; sidewalk sales, moonlight sales, foreign car shows; Junior achievement programs; garden shows; outdoor living boat shows; Go-cart shows; stamp shows; Aztec Indian Dances; European Art Display; the Singing Christmas Tree; Halloween Parades; Snowmobile Shows; Ceramic Shows; Gladiola Shows; Handicraft Shows; Sports Car Shows; Home Entertainment Shows; Dolphin Shows; Outdoor living camper shows and Mobilhome Shows."

The controversy here arose when in 1968 — seven years after the contract was made with Power Company — Cottonwood decided to furnish electrical power to the tenants on the Mall as part of a total energy plan. It constructed an energy plant just to the south of the Center and has gone through some elaborate procedures to make the system workable. The plant,[9] as well as all ducts and wires from it to the Mall, are on contiguous private property owned by Cottonwood. Cottonwood has expended about one and one-half million dollars[10] to provide this capacity and intends to furnish the power only to itself and to the tenants of Cottonwood Mall, not to other elements of the general public."[11] The charges for the electrical power, heating and air conditioning will be included in the rental rates of the tenants.

We begin our analysis by recognizing that there are few if any Utah lampposts to light our *Erie* way. But as this

---

[9]Cottonwood's facilities meet the definition of "electric plant" in § 54-2-1(19).

"The term 'electric plant' includes all real estate and fixtures and personal property owned, controlled, operated or managed in connection with or to facilitate the production, generation, transmission, delivery or furnishing of electricity for light, heat or power, and all conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power."

[10]Power Company's investment in the Center runs from one-half to over one million dollars, and its annual loss of revenues will be about one-quarter of a million dollars were Cottonwood's plan to be activated.

[11]Cottonwood expressly states it would not serve the Eldridge building or its occupants. (See note 7, *supra.*)

is a case in which there is no specific "state law,"[12] we need not be dismayed since the Federal Court may look to all resources[13] including "the decisions of other states, federal decisions or the general weight of authority," the goal being "that the federal court reach the result that would probably be reached were the question to be litigated in a state court." 1 Barron and Holtzoff, *Federal Practice and Procedure,* § 8 at 40 (Wright ed. 1961).

The analysis begins with the long-age, but still pertinent, declaration of the Utah Supreme Court on the underlying policy of public utility regulation. In Gilmer v. Public Utilities Commission, 1926, 67 Utah 222, 247 P. 284, that Court pointed out that though competition was usually a desirable goal, the states had found the case to be otherwise in the public utility field. The states felt it more suitable to put these activities under closely controlled, state granted monopolies. This means that in construing these statutes — which of course expressly cover the physical operational ac-

---

[12]To paraphrase our decision in Manual of Omaha Ins. Co. v. Russell, 10 Cir., 1968, F.2d 339, *cert. denied,* 1969, 394 U.S. 973, 89 S.Ct. 1456, 22 L.Ed.2d 753: This "is deciding what [Utah] would decide on a question they have never decided. 402 F.2d at 343 and the appended note 13.

> "This is a little less difficult than the problem posed in Judge Friendly's celebrated Erie comment: 'Our principal task in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought.' Nolan v. Trans-ocean Air Lines, 2 Cir., 1960, 276 F.2d 280, 281, rev'd. 1961, 365 U.S. 293, 81 S.Ct. 555, 5 L.Ed.2d 571, on remand, 2 Cir., 290 F.2d 904."

See also Hopkins v. Lockheed Aircraft Corp., 5 Cir., 1968, 394 F.2d 656, 657; Martinez v. Rodriguez, 5 Cir., 1969, 410 F.2d 729, 731.

[13]See Stool v. J. C. Penney Co., 5 Cir., 1968, 404 F. 2d 562; Insurance Co. of North America v. English, 5 Cir., 1968, 395 F.2d 854; Stevens Industries, Inc. v. Maryland Casualty Co., 5 Cir., 1968, 391 F.2d 411, *cert. denied,* 1968, 392 U.S. 926, 88 S.Ct. 2285, 20 L.Ed.2d 1386.

tivities of Cottonwood — we must give a liberal reading to provisions subjecting the activity to regulation while simultaneously giving a more narrow scope to the exceptions.

Two factors lead us to the conclusion that Utah would hold Cottonwood to be subject to regulation and hence not within the sole use of tenants exception. The first is the historical development of the statutory structure. The second is the nature of the activities in which the beneficial use of the electric power goes way beyond that of the tenants alone.

Substantial changes have been made in the 1917 version[14] of § 54-2-1(20) as note 5, *supra* reflects. The key interpretation of this section of the statute is Garkane Power Company v. Public Service Commission, 1940, 98 Utah 466, 100 P.2d 571. Following the reasoning of Public Utilities Commission v. Nelson, 1925, 65 Utah 457, 238 P. 237, *Garkane* held that a public utility is a business that held itself out to serve the public generally and not one that limited its customers to a certain defined group.[15] The Court, considering whether the statute applied to electrical cooperatives that supplied electrical power to their own members only, held that the regulatory powers of the Public Service

---

[14]"The term 'electrical corporation' includes every corporation and person, their lessees, trustees and receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any electric plant, or in anywise furnishing electric power, for public use within this state except where electricity is generated on or distributed by the producer through private property alone, solely for his own use or the use of his tenants and not for sale to others."

The 1917 statute was re-enacted several times prior to 1965. Somewhere down the line, "public *service*" was substituted for "*public use.*"

[15]Following *Garkane* closely is San Miguel Power Association v. Public Service Commission, 1956, 4 Utah 2d 252, 292 P.2d 511.

Commission did not apply to these cooperatives even though access to the cooperatives was open to almost anyone who applied and who paid a very nominal fee.

But in our *Erie* effort of divination this is of little help. First *Garkane* dealt with the "furnishing electrical power for public use" section of the 1917 version of § 54-2-1(20). See note 14, *supra.* Here the controversy hinges on the exception to the statute concerning distribution "solely for his own [the distributor's] use, or, the use of his tenants." Neither this part of § 54-2-1(20) nor its 1917 predecessor has ever been the subject of judicial interpretation in Utah.

Furthermore whatever light *Garkane* had cast on the legal concepts of "public" and "private" that underlie this whole area was doused by the 1956 revision (see note 5, *supra)* of the definition of "electrical corporation." First, the changes made specific reference to a "cooperative association." Next, and more signifiant, the restrictive notion of furnishing electric power "for public service" was greatly expanded. This was done by adopting for electricity what had been promulgated for gas in 1959 (see historical note in note 6, *supra)* to subject to regulation one "furnishing electrical power, * * * to its customers or members for domestic, commercial or industrial use * * *."

At least insofar as *Garkane* tried to define what "for public service" means, the 1965 statute seems clearly to overrule it. For *Garkane* expressly dealt with a company supplying electricity "to its customers or members."[16]

---

[16]The specific addition of condominiums as an exception adds weight to our conclusion. Quite apart from highly refined legalistic concepts in this modern tax-born structure, there is a considerable parallel in terms of interlocking mutual interests between condominium participants and the shopping center relationship.

But we think the legislature meant it to be more than a legislative repeal of *Garkane*. It brought gas and electricity in harmony and as reflective of a purposeful broadening of regulatory coverage, the changes were carried forward into the definition of "public utility." (See note 6, *supra*).

On the uncontradicted facts revealed by this record we think also that Utah would not consider the power furnished solely for the "use of [the] tenants." At the outset, like Mordecai at the gate, there is Eldredge and his brood of sublessees. True, Cottonwood disclaims a purpose to serve him. But Eldredge gets all the benefit from the common lighting of the interior Mall, the parking lot and all other areas not only open to the public but to which all hope and pray the public in droves will come. Eldredge customers, both real and prospective, likewise share in the cool, regulated atmosphere which Cottonwood power turns into an air-conditioned Mall. Eldridge is a direct "user" of the only beneficial function that power can supply to these premises — light and air conditioning in the public areas. Cottonwood cannot flee the statute because it in effect gives power away to Eldridge,, for the power is nonetheless "furnished."[17]

But we need not rest on this unusual fact alone. The whole activity of the merchants and operator of the Mall demonstrates that for the purposes of this utility statutory scheme, the power is not furnished "solely for the use of the tenants" (see note 5, *supra*). Not by accident, but by the sheerest deliberation, Cottonwood and the member-merchants have made others — members of the public singly or in organized groups — a principal object of the things which

---

[17]A *sale* is not required under § 54-2-1(20). Electricity need only be "furnished." (See note 5, *supra*). Under "public utility" coverage exists for electricity "sold or furnished." (See note 6, *supra*).

power supplies — light and air conditioning in the Mall and light in the parking areas. To be sure, all of this is not offered in the name of sweet charity. But at least to the extent that someone is attracted to the Center without ever making a purchase, or making a purchase from all of the contributory establishments, the beneficial enjoyment afforded is for the persons other than Cottonwood or tenants or both.

A utility structure is not based upon collateral legal concepts of property ownership. The law, as it adapts itself to the changing interests of an irrepressible society, can measure things in a realistic way. Thus, to the great delight of promoters, entrepreneurs, mortgage lenders, building contractors and merchants, the modern shopping center is a part of the community. It seeks to seek and serve the public. And the law at appropriate times recognizes its public characteristics, whatever may be the nature of legal title.[18]

With all of these factors — (i) legislative changes bringing in the concept of furnishing electricity to consumers (ii) the presence of Eldridge and (iii) widespread direct enjoyment by the public of the power furnished on a non-remunerative basis — we do not think Utah would permit this intrusion into the field of a public utility by one who

---

[18]See Amalgamated Food Employees' Union Local 590 v. Logan Valley Plaza, Inc., 1968, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603; Diamond v. Bland, Calif. Sup. Ct., 1970, ———Cal. Rptr., ———P.2d ———[39 U.S.L.W. 2342, December 16, 1970], reversing the opinion of the California Court of Appeal at 87 Cal. Rptr. 97, ———P.2d———. *Logan Valley* only addressed itself to speech activities that directly related to the business activities of the shopping center. The lower Court opinion in *Diamond* confirmed *Logan Valley* to its facts. The reversal by the California Supreme Court pointed out, however, that *Logan Valley* has possibly the far greater dimension that all speech activity permissible in a company town or a public park will be permissible in a large shopping center. We do not pass on any such issues, nor do we intimate any ultimate disposition of them, when or as any come before us later.

would be unregulated both from the standpoint of what it could do to its customers and, more so, the damage it could do to the public good by an uneconomic duplication of facilities and a raid on Power Company's customers to the detriment of all public power users. Nor do we think Utah would be persuaded by the cases from other states[19] which involve different statutes and much less precise policies.

Statutory escape failing, Cottonwood naturally turns to the Constitution to assert the statute violates the due process clause of the Fourteenth Amendment. Or in more classical constitutional terms, Cottonwood claims that the State cannot by legislation subject private economic activity to public regulation.[20]

But beginning with Munn v. Illinois, 1877, 94 U.S. 113, 24 L.Ed. 77, the Courts have moved in a direction of giving the legislature almost limitless power to regulate

---

[19]See, e.g., Drexelbrook Assoc. v. Pennsylvania Public Utility Comm'n., 1965, 418 Pa. 430, 212 A.2d 237; City of Sun Prairie v. Public Service Comm'n., 1967, 37 Wis. 2d 96, 154 N.W. 2d 360. These are for the most part apartment-tenant situations. They deal with the "service to the public" concept as in *Garkane* and not with the exception or the new broadened coverage of § 54-2-1(20) (see note 5, *supra*).

[20]Although not so presented here this can take a double form — (i) as Utah sees its own Constitution, the statute is an unwarranted invasion of private property, but (ii) if upheld by Utah it offends the federal constitution.

As to (i) we see no likelihood Utah would so hold. Although State v. Nelson, 1925, 65 Utah 457, 238 P. 237 got what some might regard as a resuscitating transfusion after the 1965 amendments (see notes 5, 6, *supra*) from Medic-Call, Inc., v. Public Service Commission, 1970, 24 Utah 2d 273, 470 P.2d 258, the narrow, limited activity there scrutinized bears no resemblance to the problem here. If it does anything it merely proves again the question-begging nature which as a "merry go round analysis," Home Insurance Co. v. Riddell, 5 Cir., 1958, 252 F.2d 1, really states the problem, not the solution. See also United States v. Stephen Brothers Line, 5 Cir., 1967, 384 F.2d 118.

Utah recognizes that a cooperative is a business "affected with a public interest," *Garkane, supra*, 100 P.2d at 574, and therefore subject to regulation under the 1965 changes.

private commercial activity. The handwriting on the wall is plain:

> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with particular school of thought. See Nebbia v. New York, 291 U.S. 502, 78 L.Ed. 940, 54 S.Ct. 505, * * *, West Coast Hotel Co. v. Parrish 300 U.S. 379, 81 L.Ed. 703, 57 S.Ct. 578. * * *."

Williamson v. Lee Optical of Oklahoma, 1955, 348 U.S. 483, 488, 75 S.Ct. 461, ——, 99 L.Ed. 563, 572. *Nebbia* made it plain that it was the nature, and not the ownership, of the business that made it susceptible to state regulation. And to meet the due process requirement, the State must not face the heavy burden it does in First Amendment cases.

> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, * * *."

Nebbia, 291 U.S. at 537, 54 S.Ct. at ——, 78 L.Ed. at 957.

There is little doubt that Utah has borne this burden here. At this date we feel it unnecessary to explain why a restriction of competition in the utility industry is a "proper

legislative purpose." When we think of the overlapping power systems, duplicative operations, and higher consumer prices that would occur if every enterprise of this or of a related nature were not subject to state regulation, it is certain that for Utah the laws have a reasonable relationship to the end.

There it ends and so does Cottonwood's total energy plan.[21]

AFFIRMED.

---

[21] Power Company concedes the preliminary injunction evaporates with this affirmance so we do not reach this point.

APPENDIX C.

DOCKET ENTRIES OF UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DATE	FILING — PROCEEDINGS
3/12/71	Opinion, Lewis, *Brown**, Seth (5th Circuit) Judgment: Affirmed.
3/24/71	Motion for ext. of time to 4/10/71 to file Petition for Rehearing — Orig. only — Cert. of Service
3/24/71	Time for filing petition for rehearing granted to 4/10/71 (HKP)
4/ 7/71	Appellants' motion for ext. of time to 4/25/71 to file petition for rehearing — Orig. and 3 cc. — Cert. of Service,
4/ 7/71	Order: Appellants *granted* to 4/25/71 to file petition for rehearing — Lewis.
4/22/71	Petition for Rehearing — Orig. and 3 cc. — Cert. of Service (4/23/71 — petition submitted to panel)
5/10/71	Order: Petition for rehearing denied. (Lewis, Brown, Seth).

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Upon consideration of petition of Appellants for Rehearing, it is ordered that said Petition be and is hereby denied.

DATED May 10, 1971.

APPENDIX D.

STATUTES WHICH THIS CASE INVOLVES

These section numbers relate to Utah Code Annotated 1953 1969 pocket supplement)

"54-4-25. *Certificate of convenience and necessity prerequisite to construction and operation — Certificates issued to electrical corporations brought under act — Air carriers.* — (1) No railroad corporation, street railroad corporation, aerial bucket tramway corporation, gas corporation, electric corporation, telephone corporation, telegraph corporation, heat corporation, automobile corporation, aircraft carrier (corporation), water corporation or sewage corporation shall hence forth establish, or begin construction or operation of a railroad, street, railroad, aerial bucket tramway, line, route, plant or system or of any extension of such railroad, street railroad, aerial bucket tramway, line, route, plant or system, without having first obtained from the commission a certificate that present or future public convenience and necessity does or will require such construction; . . . "

"54-2-1(20) The term 'electrical corporation' includes every corporation, cooperative association and person, their lessees, trustees and receivers or trustees appointed by the court whatsoever, owning, controlling, operating or managing any electric plant, or in anywise furnishing electric power, for public service or to its consumers or members for domestic, commercial or individual use, within this state ex-

cept where electricity is generated on or distributed by the producer through private property alone, i.e., property not dedicated to public use, solely for his own use, or the use of his tenants, or by an association of unit owners formed under the 'condominium ownership act,' chapter III, laws of Utah, 1963, [57-8-1 to 57-8-35] and not for sale to others."

"54-2-1(30) The term 'public utility' includes every common carrier, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewerage corporation, heat corporation and warehouseman where the service is performed for, or the commodity delivered to, the public generally, or in the case of a gas corporation or electrical corporation where the gas or electricity is sold or furnished to any member or consumers within the state of Utah for domestic, commercial or industrial use. And whenever any common carrier, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewerage corporation, heat corporation or warehouseman performs a service for or delivers a commodity to the public; or in the case of a gas corporation or electrical corporation selling or furnishing gas or electricity to any member or consumers within the state of Utah, for domestic, commercial or industrial use, for which any compensation or payment whatsoever is received, such common carrier, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, heat corporation, and warehouseman is hereby declared to be a public utility, subject to the jurisdiction and regulation of the commission and to the provisions of this title . . ."

APPENDIX E.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

UNITED STATES CONSTITUTION AMENDMENT XIV, SECTION 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF UTAH, ARTICLE I, SECTION 7 and 22.

Sec. 7. "No person shall be deprived of life, liberty or property, without due process of law."

Sec. 22. "Private property shall not be taken or damaged for public use without just compensation."

LIBRARY
SUPREME COURT, U. S.

FILED
SEP 1 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-179

COTTONWOOD MALL SHOPPING CENTER, INC., a Utah Corporation,
Petitioner,

vs.

UTAH POWER AND LIGHT COMPANY, a Corporation,
Respondent.

BRIEF OF UTAH POWER AND LIGHT COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARVIN J. BERTOCH
THOMAS A. QUINN
400 Deseret Building
Salt Lake City, Utah 84111
SIDNEY G. BAUCOM
1407 W. North Temple
Salt Lake City, Utah
Attorneys for Respondent
Utah Power and Light Company

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
ARGUMENT	6
I - THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS THAT, PETITIONER'S PLAN OF OPERATION WOULD MAKE PETITIONER AN "ELECTRICAL CORPORATION" WITHIN THE MEANING OF SECTIONS 54-2-1 (20) AND 54-4-25 (1) OF THE UTAH CODE ANNOTATED AND WOULD THEREFORE REQUIRE PETITIONER TO OBTAIN A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY, DOES NOT CONFLICT WITH THE LAW OF THE STATE OF UTAH.	6
II - THE DECISION OF THE TENTH CIRCUIT THAT UTAH LAW CAN SUBJECT PETITIONERS PROPOSED PLAN OF OPERATION TO REGULATION WITHOUT VIOLATING THE PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OR SECTION 7 OF ARTICLE I OF THE CONSTITUTION OF THE STATE OF UTAH IS NOT IN CONFLICT WITH UTAH LAW.	9
CONCLUSION	14

CASES CITED

Page

Frost v. Railroad Commission, 271 U.S. 583 (1926) 10

Garkane Power Company v. Public Service Commission, 98 Utah 466, 100 P.2d 571 (1940) 8, 11, 14

Medic-Call, Inc. v. Public Service Commission, 24 Utah 2d 273, 470 P.2d 258 (1970) 10, 11, 12, 13, 14

Michigan Public Utilities Commission v. Duke, 266 U.S. 570 (1925) 10

Nebbia v. New York, 291 U.S. 502 (1934) .. 10, 11, 14

Producers Transportation Company v. Railroad Commission of California, 251 U.S. 228 (1920) 10

State ex rel Public Utilities Commission of Utah v. Nelson, 65 Utah 457, 238 P. 237 (1925) 10, 11, 13

Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955) 10, 11

STATUTES AND RULES

Rule 19, United States Supreme Court 14

Section 54-2-1(20), Utah Code Annotated 1953, (1971 Pocket Supplement) 6, 7

Section 54-2-1(30), Utah Code Annotated 1953, (1971 Pocket Supplement) 12

Section 54-4-25(1), Utah Code Annotated 1953, (1971 Pocket Supplement) 6, 7

CONSTITUTIONAL PROVISIONS

Constitution of the State of Utah, Article I, Section 7 ..... 9, 14

Constitution of the State of Utah, Article I, Section 22 9

United States Constitution, Fourteenth Amendment 9, 14

In the Supreme Court of the United States

OCTOBER TERM, 1971

NO. .....

COTTONWOOD MALL SHOPPING CENTER, INC., a Utah Corporation,
Petitioner,

vs.

UTAH POWER AND LIGHT COMPANY, a Corporation,
Respondent.

BRIEF OF UTAH POWER AND LIGHT COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner owns and operates a shopping center located in Salt Lake County, State of Utah, known as the Cottonwood Mall. This shopping center consists of a complex of stores and buildings surrounding an enclosed mall used by the tenants as a common facility (R. 120)

and by the public as the main promenade between the various offices and stores.

Petitioner owns title to all of the real property and improvements thereon which form the Cottonwood Mall complex. The stores, buildings and offices included in the shopping center are leased by the Petitioner to tenants with the exception of the Eldredge Furniture Company Building which is being purchased under a Uniform Real Estate Contract by W. J. Eldredge Company. (R. 116-118). This building is occupied by the Eldredge Furniture Company and two (2) lessees from Eldredge: Morgan Jewelry Company and Ex-Cel-Cis Beauty Salon. (R. 254).

On or about June 15, 1961, Petitioner and Respondent entered into a written agreement pursuant to which Respondent was to provide underground electrical service to the Cottonwood Mall Shopping Center and assume certain costs in connection with the construction of an underground primary and secondary electrical distribution system. (R. 63-66). In order to perform that agreement, Respondent has expended a total of $1,280,000, approximately $558,000 of which was incurred for the express purpose of providing electrical service to the Cottonwood Mall. The additional $724,000 of expenses incurred by Respondent to serve the Cottonwood Mall represents the cost of the supporting generating and transmission equipment. By 1969 Respondent was, and now is, serving approximately 70 customers at the mall. If Respondent were to lose all of its customers at the Cottonwood Mall theidlin g of its capital investment devoted to serving the Mall would result in an annual loss in gross revenues of $227,000.

In September of 1964, at the request of Petitioner's agent, Respondent installed additional facilities for the express purpose of providing service to a proposed new J. C. Penney Company Store. (R. 70-75). That store was completed in 1969, and Respondent now serves it pursuant to written contract.

Respondent is a public utility, offering electrical service to its customers in Salt Lake County pursuant to various franchises and certificates of public convenience and necessity. (R. 101-102). Petitioner does not have a certificate of public convenience and necessity to furnish electrical service in any locale. In 1969, after the Respondent's expenditure of $1,280,000 to serve the Mall customers, Petitioner installed a total energy unit at the Cottonwood Mall and seeks to compete with the Respondent in supplying electrical power for use at the shopping center.

In addition to the tenants of the Cottonwood Mall the facilities of the Mall are utilized by the following categories of persons:

(1) The general public attracted to the Mall in large numbers for general shopping purposes. (R. 307).

(2) Promoters and other personnel connected with the so-called "traffic building events" held at the Mall such as automobile shows, charity bazaars, art shows, Indian dancers, traveling circus, dolphin show . . . etc., (R. 166, 178-186, 242, 243), held when the stores and offices at the Mall are open for business.

(3) The general public attracted to the Mall to attend or view those events.

(4) The general public which attends school dances, Easter Sunrise Services, church dances, square dances, regular Sunday church services, firemen's social, Chevrolet Show. These activities are held when the stores or offices at the Mall are not open for business and are not considered by the Manager of the Cottonwood Mall Merchants Association to be traffic building events. (R. 166-175, 177, 180, 185).

(5) The general public attracted to the Mall to shop at Eldredge Furniture Company or its lessees, Morgan Jewelry Company and Ex-Cel-Cis Beauty Salon.

(6) The management and employees of Eldredge Furniture and its sub-lessees who use the Cottonwood Mall facilities directly and benefit from their use by the general public.

As it is formulated in the second amended series of pleadings (R. 84, 97 and 125) the present controversy, as presented to the trial court, can be summarized as follows:

(1) Plaintiff (Petitioner) contends Defendant (Respondent) has; (a) by certain specific acts, attempted to monopolize the market for electrical power at the Cottonwood Mall, and (b) interfered with an allegedly existing contract providing for the sale of electrical power by Petitioner to J. C. Penney Company for its store at the Cottonwood Mall;

(2) Defendant (Respondent) generally denies Petitioner's claims and alleges that: (a) Respondent is providing electrical power to the tenants at the Cottonwood Mall pursuant to existing agreements between Re-

spondent and Petitioner and between Respondent and various tenants of the Cottonwood Mall, including J. C. Penney Company; (b) Petitioner seeks to interfere with Respondent's legitimate contractual relationships with the tenants at the Cottonwood Mall including J. C. Penney Company; (c) because of the substantial sums spent by Respondent to provide electrical service to the tenants of Cottonwood Mall at the request of Petitioner, Petitioner is estopped to compete with Respondent in serving tenants of the Mall; (d) Petitioner lacks the necessary certificate of public convenience and necessity to provide electrical service to consumers at the Cottonwood Mall.

Respondent prays for an injunction to prevent Petitioner from damaging or interfering with Respondent's business relationship with its customers at the Cottonwood Mall.

On July 11, 1969, the Lower Court granted Respondent's Motion for Summary Judgment holding that Petitioner's proposal to sell electrical power at the Cottonwood Mall would require Petitioner to first obtain a certificate of public convenience and necessity. Lacking such a certificate Petitioner could not legally sell electrical power at the Cottonwood Mall in competition with Respondent. Therefore, Petitioner was not in a position to complain that Respondent was preventing Plaintiff from competing in the market for electrical energy at the Cottonwood Mall or interfering with its alleged contract to supply power to J. C. Penney Company. (R. 131-136).

Petitioner appealed the Lower Court's decision to the Tenth Circuit Court of Appeals which affirmed the

Lower Court's decision holding: (1) That Petitioner's proposal to provide electrical service to the Cottonwood Mall would bring Petitioner within the definition of an "electrical corporation" contained in Section 54-2-1 (20) of the Utah Code Annotated 1953 (1971 Pocket Supplement) thus requiring Petitioner to first obtain a certificate of public convenience and necessity; and (2) that in so requiring the Utah Statute did not violate the provisions of the Fourteenth Amendment to the United States Constitution or Section 7 of Article I of the Constitution of the State of Utah.

ARGUMENT

I

THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS THAT, PETITIONER'S PLAN OF OPERATION WOULD MAKE PETITIONER AN "ELECTRICAL CORPORATION" WITHIN THE MEANING OF SECTIONS 54-2-1 (20) AND 54-4-25 (1) OF THE UTAH CODE ANNOTATED AND WOULD THEREFORE REQUIRE PETITIONER TO OBTAIN A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY, DOES NOT CONFLICT WITH THE LAW OF THE STATE OF UTAH.

Section 54-2-1 (20) of the Utah Code Annotated 1953 (Replacement Volume 6, 1969 Pocket Supplement) provides as follows:

> "(20) The term 'electrical corporation' includes every corporation, cooperative association and person, their lessees, trustees and receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any electric plant, or in anywise furnishing electric power, for public service or to its consumers or members for domestic, commercial or industrial use, within this state except where electricity is generated on or distributed by the producer through private property alone, i.e., property not dedicated to public use solely for his own use or the use of his tenants, or by an association of unit owners formed under the 'condominium ownership act,' chapter III, laws of Utah, 1963, [57-8-1 to 57-8-35] and not for sale to others."

Section 54-4-25 (1) of the Utah Code Annotated 1953 (replacement Volume 6, Pocket Supplement) provides in pertinent part as follows:

> "(1) No . . . electric corporation . . . shall henceforth establish or begin construction or operation of a . . . line, route, plant or system . . . without having first obtained from the commission a certificate that present or future public convenience and necessity does or will require such construction. . . ."

The primary question facing both the trial and appellate courts was one of statutory construction. Did Petioner's proposed plan of operation constitute Petitioner an "electrical corporation" within the above definition? Did Petitioner's proposed plan of operation come within the exception to the general definition? Specifically, would Petitioner be furnishing electricity "solely for his own use, or the use of his tenants."

Judge Willis Ritter, the district court judge, considered the case to be one of first impression in the State

of Utah. So, also, did the Appellate Court. Indeed, even Petitioner noted in its brief for the trial court that:

> "Plaintiff (Petitioner) has been unable to find any case contruing an exception similar to the one involved in the case at bar. . . ."

This is confirmed by the fact that Petitioner, in its brief in support of the subject petition, was unable to cite a single decision from Utah or any other jurisdiction, interpreting statutory provisions similar to those involved in this case. The one Utah case cited by Petitioner on this issue is *Garkane Power Company vs. Public Service Commission of Utah*, 98 Utah 466, 100 P.2d 571 (1940). However, since the *Garkane* decision the statute has been changed to broaden the jurisdiction of the Public Service Commission to include every "corporation furnishing electric power . . . to . . . consumers or members. . . ." Thus the *Garkane* case is not applicable. Consequently, on that issue, as posed in this case, there is no existing Utah case law with which the decision of the Tenth Circuit Court of Appeals could conflict.

However, Petitioner argues that the statutory provisions are self-evident, require no interpretation and that the decision of the Tenth Circuit conflicts with the plain meaning of the statute. One trial judge and three appellate judges have agreed that the statute's plain meaning is self evident but that it plainly means something other than the Petitioner claims it means.

In summary, since the decision of the Tenth Circuit is the first decision interpreting the relevant statutory provision, it is tautological to say that the decision cannot be in conflict with Utah law.

II

THE DECISION OF THE TENTH CIRCUIT THAT UTAH LAW CAN SUBJECT PETITIONER'S PROPOSED PLAN OF OPERATION TO REGULATION WITHOUT VIOLATING THE PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OR SECTION 7 OF ARTICLE I OF THE CONSTITUTION OF THE STATE OF UTAH IS NOT IN CONFLICT WITH UTAH LAW.

Petitioner asserts that under Utah law and the decisions of this Court, any statute which would subject the Petitioner's proposed plan of operation to regulation by the Public Service Commission of the State of Utah would violate the due process provisions of the Fourteenth Amendment of the Constitution of the United States[1] and Section 7 of Article I of the Constitution of the State of Utah[2] and would constitute a taking of private property without just compensation in violation of Section 22 of Article I of the Constitution of the State of Utah.[3]

It is idle to discuss the taking of private property without just compensation issue for two reasons: (1) It was not raised on appeal to the Tenth Circuit and thus is not properly before this Court, and (2) Petitioner neither cited cases nor made argument in support of his position on that issue.

With respect to Petitioner's due process argument,

---

[1]Set out in Petitioner's Brief.
[2]Set out in Petitioner's Brief.
[3]Set out in Petitioner's Brief.

it is significant that all of the United States Supreme Court Cases cited for Petitioner, [*Producers Transportation Company v.Railroad Commission of California*, 251 U.S. 228 (1919); *Michigan Public Utilities Commission v. Duke*, 266 U.S. 570 (1925); *Frost v. Railroad Commission*, 271 U.S. 583 (1926)], predate the due process cases cited and quoted by the Tenth Circuit in support of its decision on this issue; [*Nebbia v. New York*, 291 U.S. 502 (1934) and *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955)]. The latter decisions make it obvious that, rather than being in conflict with the decisions of this Court, the opinion of the Tenth Circuit is in harmony with the principle of law well established by this Court to the effect that State laws which have a reasonable relation to a proper legislative purpose and are neither discriminatory nor arbitrary are in accord with the requirements of due process. Certainly, a state statutory scheme which requires all "electrical corporations" to obtain certificates of public convenience and necessity would clearly have a reasonable relationship to a proper legislative purpose, i.e., the provision of dependable, efficient electrical service and the avoidance of costly duplication of electrical power facilities and services at the expense of the rate-paying public.

Notwithstanding the foregoing, Petitioner cites two cases which assertedly stand for the proposition that under Utah law the Legislature cannot "by mere legislative fiat" convert a private business into a public utility [*State ex rel Public Service Utilities Commission of Utah v. Nelson*, 65 Utah 457; 238 P. 237 (1925), and *Medic-Call, Inc. v. Public Service Commission*, 24 Utah 2d 273, 470 P.2d 258 (1970)]. Petitioner contends that

any statute so construed would violate the concepts of due process.

As authority for Petitioner's positions, the *Nelson* and *Medic-Call* cases have serious deficiencies:

(1) The Nelson decision (1925) dates from a time prior to this Court's decision in *Nebbia v. New York* (1934) in which this Court said:

> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislatuve purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, . . ."

1925 represents a period when it was still common for courts to utilize the concept of due process to strike down state laws, regulatory of business and industrial conditions [*Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955)]. In the *Williamson* case this court said:

> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with particular school of thought."

(2) In *Garkane Power Company v. Public Service Commission*, 98 Utah 466 (1940), the Utah Supreme Court cited the *Nebbia* decision with approval and in so

doing recognized that a private business could be "affected with a public interest" (*Id.* at 472) and therefore subject to regulation.

(3) A careful reading of *Medic-Call, Inc. v. Public Service Commission*, 24 Utah 2d 273, 470 P.2d 258 (1970) reveals that, contrary to Petitioner's argument, the Court did not hold that the Utah Legislature cannot subject private business to regulation by the Utah Public Service Commission. In order to appreciate the true significance of the *Medic-Call* decision, it is essential to understand that "telephone corporations" and "electrical corporations" receive different treatment in the Utah statutory scheme. Section 54-2-1 (30) of the Utah Code Annotated 1953 (Replacement Volume 6, 1969, Pocket Supplement) provides in pertinent part as follows:

> "The term 'public utility' includes every . . . electrical corporation, telephone corporation . . . where the service is performed for, or the commodity delivered to, *the public generally, or in the case of a gas or electrical corporation, where the gas or electricity is sold or furnished to any member or consumers within the state of Utah,* for domestic, commercial or industrial use. And whenever any . . . electrical corporation, telephone corporation . . . performs a service for or delivers a commodity to the public; or in the case of a gas corporation or electrical corporation selling or furnishing gas or electricity to any member or consumers within the state of Utah, for domestic, commercial or industrial use, for which any commercial or industrial use, for which any compensation or payment whatsoever is received, such . . . is hereby declared to be a public utility, subject to the jurisdiction and regulation of the commission and to the provisions of this title.". (Emphasis added.)

Note that in Utah, a "telephone corporation" must perform a service for the "public generally" before it is defined as a public utility. On the other hand, an "electrical corporation" need only furnish a service or commodity to a "member or consumers" in order to be defined as a public utility. In view of this statutory context, the Utah Supreme Court concluded that a physician's pocket radio paging service, available only to a limited number of licensed physicians who were members of a nonprofit association, was not a public utility and thus not subject to regulation by the Public Utility Commission. In so holding the Court stated:

> "In holding that the Commission had no authority to regulate the business of Nelson, this Court said at Page 462 of the Utah Reports, 238 P. at Page 239:
>
> > 'No one may successfully contend that it is competent for the Legislature to regulate and control in such respect a mere private business or to declare a private business to be public service or a public utility. In other words, the state may not, by mere legislative fiat or edict, or by regulating orders of a commission convert mere private contracts or a mere private business into a public utility or make its owner a common carrier. So, if the business or concern is not public service, where the public has not a legal right to the use of it, where the business or operation is not open to an indefinite public, it is not subject to the jurisdiction or regulation of the commission. * * *' " (*Medic-Call, Inc. v. Public Service Commission*, supra at 275.)

In this context, the Utah Court appears to be saying not that the Legislature cannot subject private business to regulation by the Commission, but rather, that

the Commission cannot assert jurisdiction without statutory authority. Certainly, this is the only possible interpretation of the *Medic-Call* decision which is consistent with the prior decision of the Utah court in *Garkane* and this Court's decision in *Nebbia* and the numerous cases following that line of authority.

In summary, the Tenth Circuit decision that the applicable Utah statutes, as interpreted, did not violate provisions of either the Fourteenth Amendment to the United States Constitution or Section 7 of Article I of the Constitution of the State of Utah, is not in conflict with the opinions of this Court or of the Courts of the State of Utah.

CONCLUSION

Since the opinion of the Tenth Circuit does not conflict with the law of the State of Utah, and no other reasons in contemplation of this Courts' rule 19 have been put forth by Petitioner for granting certiorari, the subject petition should be denied.

Respectfully submitted,

MARVIN J. BERTOCH
THOMAS A. QUINN
400 Deseret Building
Salt Lake City, Utah 84111

SIDNEY G. BAUCOM
1407 W. North Temple
Salt Lake City, Utah

Attorneys for Respondent
Utah Power and Light Company